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In the Supreme Court of the United States

OCTOBER TERM, 1979

AUGUST BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals (Pet. App. 34) is noted at 608 F. 2d 1372 (table).

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1979. A petition for rehearing was denied on January 30, 1980 (Pet. App. 35-36). The petition for a writ of certiorari was filed on March 19, 1980, and is thus out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence at trial, including identification evidence, was sufficient to support petitioner's conviction.

2. Whether the district court erred in failing to admit an FBI fingerprint report into evidence.

3. Whether the court erred in correcting a typographical error in the indictment.

4. Whether the indictment was defective in failing to specify the owner of the stolen money, that it was taken without the owner's consent, and that it was "United States currency."

5. Whether the court erred in taking judicial notice of the fact that the Corpus Christi Naval Air Station is a federal enclave.

6. Whether the government was required to prove that the weapon used in the robbery was a pistol because the indictment referred to use of a pistol.

7. Whether the court erred in failing to give a specific charge on circumstantial evidence.

8. Whether the court's charge to the jury in accordance with the language of the statute improperly varied from the indictment.

STATUTORY PROVISIONS INVOLVED

Section 29.02 of the Texas Penal Code Ann. (Vernon 1974) provides in pertinent part:

> *Robbery*
>
> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 of this code and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Section 29.03 of the Texas Penal Code Ann. (Vernon 1974) provides in pertinent part:

Aggravated Robbery

(a) A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he:

(1) causes serious bodily injury to another; or

(2) uses or exhibits a deadly weapon.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of aggravated robbery, in violation of 18 U.S.C. 13 (the Assimilative Crimes Act) and Section 29.03 of the Texas Penal Code. He was sentenced to 12 years' imprisonment (Pet. App. 33). The court of appeals summarily affirmed (Pet. App. 34).

The evidence at trial showed that, on August 5, 1978, petitioner and another black male robbed at gunpoint a liquor store at the Corpus Christi Naval Air Station. After tying up Lorraine Boyd, the supervisor at the store, they absconded with $900. Two minutes later, a customer freed Ms. Boyd and telephoned the base security officers (Tr. 8-17, 33). Ruben Cuevas, a guard stationed at the installation's front gate, heard on his radio that a robbery had taken place. He was told to be on the lookout for two black males in a blue car. Shortly thereafter, Cuevas saw a blue car being driven over the shoulder of the road to get around other cars stopped at the gate. He ordered the

black male driver to stop, but the car hurtled at him and sped away. Cuevas saw a second black male hiding between the dashboard and the front seat as the car passed him. Cuevas wrote down the number of the vehicle's license plate, NJP-825 (Tr. 37-39).

Shortly after the robbery, E.C. Miller, who lived near the Air Station, observed a blue Buick park in his neighbor McDaniel's driveway. Two black men got out of the car and walked away in the direction from which the car had come. The car was still in the driveway the next morning when the police arranged to have it towed away at McDaniel's request and impounded it (Tr. 52-53, 56-58). The license number of the car matched that of the car Cuevas had seen driving away from the Air Station, and petitioner later admitted to an investigator that the car belonged to him (Tr. 65-69). Indeed, petitioner came to claim the car about a week after it had been impounded. The car was never reported stolen (Tr. 146-147, 153-154). A search of the car pursuant to a warrant revealed $165 stuffed underneath the driver's seat and various documents, including petitioner's driver's license and military dependent identification card (Tr. 73-74).

Both Lorraine Boyd and Ruben Cuevas identified petitioner in court as one of the robbers (Tr. 18-19, 39). Boyd had previously picked petitioner's photograph out of a seven photo array shown to her by the FBI approximately ten days after the robbery (Tr. 23-28, 78).[1]

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[1]There is conflicting evidence in the record regarding the degree of certainty with which Boyd picked out petitioner's photo. When Boyd attempted to identify the second robber, she selected the picture of a man not involved in the robbery. She testified that she had told the agent that her degree of certainty with regard to the identification of petitioner's photograph had been "five" and that her degree of certainty regarding the other identification was "nine," but also said

ARGUMENT

1. Petitioner generally asserts (Pet. 9) that he is innocent, but the evidence summarized above is clearly sufficient to support his conviction.[2] Specifically, he contends (Pet. 14-17) that the identification evidence introduced by the government was insufficient to prove his guilt, stating (Pet. 14) that there was no positive identification of him by either Boyd or Cuevas. The facts belie petitioner's contention, for both witnesses identified him in court, and Boyd also selected his photograph in a pretrial photo array identification procedure. Petitioner does not claim that the photo identification procedure was improper in any way, and there is no evidence in the record of any defect in the photo array procedure employed by the FBI. Thus, petitioner's discussion (Pet. 15-17) of cases dealing with impermissibly suggestive pretrial identification procedures is irrelevant.

Petitioner also contends that his innocence is established by the fact that both Boyd and Cuevas testified that he was clean shaven on the day of the robbery, whereas he "was never clean shaven in the last five years" (Pet. 9). But there is no evidence in the record that petitioner had a beard or moustache at any time other than the day of the trial. Similarly, petitioner now seeks to rebut other evidence against him by claiming that "his car was stolen"

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that she may have gotten the "five" and "nine" mixed up (Tr. 23-28). The FBI agent who showed her the photo array testified that Boyd had characterized her identification of petitioner's photograph as a "nine" and the misidentification of the other man as a "five" (Tr. 78-80).

[2]Petitioner did not take the stand. The only evidence he put forward in his defense related to fingerprint identifications. As is discussed in point 2, *infra*, that evidence was not exculpatory.

(Pet. 9). Again, there is no evidence in the record to that effect, and the record does show that petitioner did not report his car as stolen.[3]

2. Petitioner also contends (Pet. 28) that the trial court improperly excluded an FBI fingerprint report that tended to exculpate him. This contention is without merit.

Lorraine Boyd, the robbery victim, testified that petitioner picked up a bottle of brandy in the store and that the other robber handled a six-pack of beer (Tr. 18-19, 22). Latent fingerprints were taken from the brandy bottle and the six-pack and sent to the FBI for analysis. Working with an incomplete set of petitioner's known fingerprints, the FBI reported that two fingerprints, apparently taken from the six-pack of beer, did not match petitioner's known prints. The report also said that other latent prints could not conclusively be compared with the incomplete set of petitioner's known prints (Tr. 97-99, 112, 117, 127). The report was properly excluded because it did not tend to exculpate petitioner and might have confused the jury. See Fed. R. Evid. 403. Since there was no claim by the government that petitioner had touched

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[3]Petitioner states (Pet. 17) that the Corpus Christi police have pictures of him, not introduced at trial, that prove he was not clean shaven on the day of the robbery. Petitioner also states (Pet. 23-24) that his co-workers "know that he was not clean shaven" on the day of the robbery, and that he has proof, in the form of a long distance telephone bill, that he reported his car stolen. This evidence is not in the record, and petitioner has not raised these claims before. If petitioner is aware of newly discovered exculpatory evidence, the proper place to seek relief is in the district court.

the six-pack of beer, the fact that the latent fingerprints on it did not match his known prints obviously had no tendency to establish his innocence.[4]

3. Petitioner's remaining claims are insubstantial on their face and do not require a detailed response here.

a. Petitioner asserts (Pet. 10-14) that the trial court erred in granting the government's motion to correct a typographical error in the indictment. The Assimilative Crimes Act was incorrectly cited as 18 U.S.C. 3 instead of 18 U.S.C. 13. Petitioner makes no claim that he was misled by what defense counsel at trial characterized as "a clerical error" (Tr. 170). He was properly advised as to the nature of the charges against him. Rule 7(c)(3) of the Federal Rules of Criminal Procedure specifically provides that an error in the citation of a statute "shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

b. Petitioner also contends (Pet. 20-22) that the indictment was defective in failing to allege specifically who owned the $900 that was stolen, that the money was United States currency, and that it was taken without the

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[4]In any event, petitioner was permitted to introduce virtually the same evidence in another form. The prosecutor agreed that he would not object to the introduction of expert fingerprint testimony if petitioner submitted to a complete fingerprinting that might allow a more informed judgment concerning the other latent prints. Petitioner did submit to such fingerprinting, and he was then allowed to call Sergeant Wilson of the Corpus Christi Police Department to make an expert comparison. Wilson's testimony, based on a complete set of known fingerprints, was consistent with the conclusions of the FBI report. He testified that the latent prints found on the beer cans did not match petitioner's fingerprints, but the prints found on the brandy bottle were too poor to permit comparison (Tr. 97-99, 118, 123-126, 139-142).

owner's consent. These omissions do not constitute defects in the indictment. The indictment (Pet. App. 31-32) plainly contained the elements of the offense charged and informed petitioner of the charges against him as required by law. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 117 (1974).

c. Petitioner's contention (Pet. 17-18) that the district court erred in taking judicial notice of the fact that the Corpus Christi Naval Air Station is a federal enclave for purposes of 18 U.S.C. 13 is frivolous. See, *e.g.*, *United States* v. *Hughes*, 542 F. 2d 246, 248 n.1 (5th Cir. 1976).

d. Petitioner also contends (Pet. 18-20) that because the indictment alleged that the deadly weapon used was a pistol and the government did not prove that the gun used in the robbery was in fact a pistol, his conviction should be reversed. Because the statute requires use or exhibition of a deadly weapon, not necessarily a pistol, petitioner's contention is without foundation. In any event, the evidence at trial was sufficient to support a finding that the weapon was a handgun. It is most unlikely that the robbers could have hidden a shotgun on their persons while they were in the store and still have been able to pretend to be normal customers.

e. Petitioner's contention (Pet. 22-23) that he was entitled to an instruction on circumstantial evidence is also without merit. Contrary to his assertion (*ibid.*), there was indeed direct evidence that he was one of the robbers, Lorraine Boyd's testimony. In any event, this Court has stated that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954). See also *United States* v. *Clements*, 588 F. 2d 1030, 1040 (5th Cir.), cert. denied, 440 U.S. 982, 441 U.S. 936 (1979).

f. Petitioner also contends (Pet. 24-28) that because the charge in the indictment was phrased in the conjunctive, it was reversible error for the district court to instruct the jury in the disjunctive.[5] This contention is without merit. Where an offense is worded disjunctively in the statute, as it is in Section 29.03 of the Texas Penal Code, there is no error in charging the jury in the disjunctive even if the indictment is phrased in the conjunctive. See, *e.g.*, *United States* v. *Duran*, 411 F. 2d 275, 278 (5th Cir. 1969); *Rimerman* v. *United States*, 374 F. 2d 251, 253-254 (8th Cir.), cert. denied, 387 U.S. 931 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]For example, the indictment reads "knowingly *and* intentionally threaten," while the court's instruction reads "intentionally *or* knowingly threaten." See Pet. 24.

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